

STATE OF MICHIGAN
COURT OF APPEALS

LAWSUIT FINANCING, INC., and
RAINMAKER USA, L.L.C.,

UNPUBLISHED
April 3, 2007

Plaintiffs-Appellants/Cross-
Appellees,

v

ELIAS MUAWAD and LAW OFFICES OF
MUAWAD & MUAWAD, P.C.,

No. 272259
Macomb Circuit Court
LC No. 2005-004763-CK

Defendants-Appellees/Cross-
Appellants.

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(7) on the ground that plaintiffs' claim was disposed of before this lawsuit was filed, pursuant to a court order in an earlier action. Defendants cross appeal from the trial court's denial of their motion for summary disposition on the alternative basis of res judicata. We reverse and remand.

I. Basic Facts and Procedural History

In connection with an earlier action, plaintiffs entered into a written purchase agreement with defendants' clients. Through this agreement plaintiffs acquired a \$50,000 lien against the clients' anticipated recovery in the underlying lawsuit in exchange for \$10,000. Defendant Elias Muawad signed as the clients' attorney under the following paragraph included at the end of the purchase agreement:

I, Elias Muawad, Esq., the undersigned attorney ("Attorney") for the Seller, received and agree that the *Purchase Agreement and Lien* for the Seller are legal, binding and enforceable. I agree to distribute any Proceeds of the Litigation in accordance with the terms of the Purchase Agreement and Lien (merged document). All proceeds recovered will be deposited into and distributed from my clients Trust Account. . . . By execution hereof, I am only following the instructions of Seller. . . . By the execution hereof, I assume no duties or obligations to Buyer other than the ministerial duties of disbursement of proceeds

to satisfy the lien, at the time that proceeds are received and of furnishing ongoing requested information as specifically outlined herein, including a written “closing statement” that shall have a worksheet of all proceeds received in connection with this claim/settlement judgment and all payoffs to lien holders. [Emphasis in original.]

After the underlying matter was resolved, defendants, citing a breakdown of the attorney-client relationship arising from a dispute concerning attorney fees, moved to have the proceeds of the litigation released to their client trust account for disbursement. The trial court granted defendants’ motion and ordered that the litigation proceeds be distributed to defendants and the clients. The proceeds were later distributed in accordance with the trial court’s order, which did not make provision for satisfaction of plaintiffs’ lien.

Defendants’ clients subsequently filed suit seeking a judicial declaration that the purchase agreement effectuated what amounted to a usurious loan and that plaintiffs were, therefore, entitled only to recover the principal amount borrowed, i.e., \$10,000. Plaintiffs counterclaimed to enforce the purchase agreement, and later moved to amend their counterclaim to include a claim that defendants breached their obligation to satisfy plaintiffs’ lien before distributing any proceeds of the underlying litigation to the clients. Defendants opposed the motion, arguing, among other things, that their authority to disburse funds in accordance with the purchase agreement had been revoked by the clients and that, in any event, their duty in this regard was “ministerial” in nature and did not substantively obligate them to honor plaintiffs’ lien. Noting that case evaluation was only a few weeks away, defendants further asserted that amendment of plaintiffs’ counterclaim would prejudice them because they had not materially participated in discovery, which was now closed, because they were not substantively involved in the action from its outset. The trial court denied plaintiffs’ motion, stating only that, “[b]ased on the law and facts presented to this Court, the motion is denied.” The litigation concluded with entry of a judgment upholding the purchase agreement and lien, and awarding plaintiffs “damages in the amount of \$50,000 (due under . . . the [a]greement).” Four days later, the clients initiated bankruptcy proceedings.

Thereafter, plaintiffs filed this action alleging breach of defendants’ duty to honor plaintiffs’ lien in the underlying lawsuit, and breach of defendants’ alleged obligations under the purchase agreement to satisfy plaintiffs’ lien before disbursing any funds to the clients. Defendants responded by moving for summary disposition, arguing that plaintiffs’ claims were barred by res judicata and by disposition of the proceeds in the underlying lawsuit by order of the court. Although concluding that res judicata did not apply to bar plaintiffs’ claims, the trial court granted summary disposition in favor of defendants under MCR 2.116(C)(7) on the alternative ground that the disputed funds were disposed of by the court’s disbursement order in the underlying litigation. This appeal followed.

II. Analysis

This Court reviews de novo a trial court’s decision on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Constr Co, Inc v Rosati Masonry Co Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). Summary disposition is proper under MCR 2.116(C)(7) if “[t]he claim is barred because of prior judgment . . . or assignment or other disposition of the claim before commencement of the action.” “In analyzing a motion for summary disposition pursuant

to MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.” *Pusakulich v Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). If there is no factual dispute, whether a plaintiff’s claim is barred under a principles set forth in MCR 2.116(C)(7) is a question of law for this Court to decide. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995).

We first address defendants’ claim that the trial court erred in denying their motion for summary disposition on the basis of res judicata. Defendants argue that the trial court’s denial of plaintiffs’ motion to amend their countercomplaint in the declaratory judgment action was impliedly based on a determination of futility and, therefore, was a determination on the merits, such that the present action is barred by res judicata. We disagree.

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the second action are identical to those essential to a prior action. *Ozark v Kais*, 184 Mich App 302, 307; 457 NW2d 145 (1990). Among other things, application of the doctrine requires a showing that the prior action was decided on the merits. *Id.* at 307-308. The burden of establishing the applicability of res judicata is on the party asserting it. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

“In most instances, the denial of a motion to amend will not be a decision on the merits.” *Martin v Michigan Consolidated Gas Co*, 114 Mich App 380, 383; 319 NW2d 352 (1982). “For example, when amendment is denied because of undue delay, bad faith, dilatory motive or undue prejudice to the opposing party . . . the substance of the claims sought to be added will not likely have been considered.” *Id.* “However, when . . . the denial is made on the basis of the futility of the amendment, it is in effect a determination that the added claims are substantively without merit; that is, that the claims are frivolous or legally insufficient on their face.” *Id.* at 384. “Such a determination is entitled to res judicata impact.” *Id.*

On the facts of this case, we conclude that the trial court correctly found that defendants failed to demonstrate that the court’s denial of plaintiffs’ motion to amend in the declaratory judgment action was a determination on the merits entitled to res judicata effect. As indicated above, defendants opposed the motion to amend on several grounds, including prejudice resulting from plaintiffs’ undue delay in bringing the motion to amend, which is an argument unrelated to the merits of the proposed amendment. The trial court found that the record did not reflect the reasons for the denial and, therefore, it could not reasonably conclude that the denial was based on a determination of futility. *Id.* Because the grounds on which the trial court relied in denying plaintiffs’ motion to amend are not apparent from the record, the trial court did not err in declining to grant summary disposition to defendants on the basis of res judicata. *Baraga, supra*.

We further conclude, however, that the trial court erred in granting summary disposition on the ground that the proceeds of the underlying litigation “were already disposed of pursuant to a prior order.” In granting summary disposition on this ground, the trial court relied on plaintiffs’ failure to dispute defendants’ assertion that their duties were “merely ministerial,” that the clients were not precluded from revoking defendants’ authority, and that the clients did revoke their authority. However, these facts do not support a grant of summary disposition under MCR 2.116(C)(7). As previously noted, MCR 2.116(C)(7) permits summary disposition

when a “*claim* is barred because of . . . assignment or other disposition of the claim before commencement of the action.” (Emphasis added). Here, the “claims” raised by plaintiffs in their complaint alleged breach by defendants of their duty to honor plaintiffs’ lien and to meet its obligations under the purchase agreement. Although the funds that were the subject of these claims were undisputedly disbursed by order of the court in a separate action before commencement of this suit, that fact did nothing to resolve or otherwise dispose of the claims raised by plaintiffs in their complaint. Summary disposition on that ground was, therefore, improper.

Additionally, we note that the mere fact that defendants’ duty to disburse the proceeds in order to satisfy plaintiffs’ lien was ministerial in nature does not, in itself, relieve defendant of that obligation. Further, even assuming that the purchase agreement may have permitted the clients to revoke defendants’ authority to disburse the proceeds to plaintiffs, defendants failed to present any evidence that such authority had in fact been revoked. See MCR 2.116(G)(6). Thus, we find the factual basis on which the trial court relied in granting summary disposition to be improper regardless of the sufficiency of such facts to support summary disposition under MCR 2.116(C)(7).

Reversed and remanded for further proceedings consistent with this opinion.¹ We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Joel P. Hoekstra

¹ We note that the remainder of the issues raised by plaintiffs, having been first raised on motion for reconsideration below or now on appeal, have not been substantively addressed by the trial court. Under these circumstances, we decline to address them in this appeal. See *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987) (a trial court is not obligated to consider legal arguments raised for the first time on motion for reconsideration); see also *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005) (this Court “need not address issues first raised on appeal”).